and the same inducement for defensive armament would apply to the case of submarines. If armed merchant vessels are not accorded the right of warning before attack, the same right might be denied to unarmed merchantmen, since they might easily sink a submarine by ramming.[21] Though submarines are defensively so weak that it is very dangerous for them to warn merchant vessels, whether armed or unarmed, this fact cannot affect the neutral rights involved.[22] Inasmuch as belligerent merchantmen are accorded the right of warning, and no distinction has ever been drawn between the rights of defensively armed and unarmed merchant vessels previous to the present war, the rules that apply to one would certainly seem to apply to the other. The German contention would subject such vessels to the risks of warships without according them any of the offensive rights of warships, such as visit, search, and capture.[23]

THE ADOPTION OF THE COMMON LAW.—The common law of England, in so far as it was suitable to new conditions, was in force in this country before 1776, and the decisions of the higher English courts were of controlling authority in the colonies.[1] After the Revolution, the so-called English common law, when it was not adopted as a system of jurisprudence by constitutional provision[2] or by statute,[3] was recognized, without legislative declaration, as part of the law of the eastern states, under the doctrine that the original law of conquered or ceded territory is in force until abrogated.[4] Of course, the common law is not uniform throughout the states. In some, the common law prior

[21]Marshall, C. J., in The Nereide, *supra*, at p. 428, in speaking of resistance to the right of search of neutral goods by the arming of a belligerent merchant vessel, says: "It is difficult to perceive in this argument any thing which does not also apply to an unarmed vessel. In both instances it is the right and the duty of the carrier to avoid capture and to prevent a search. There is no difference *except in the degree of capacity to carry this duty into effect.** The argument would operate against the rule which permits the neutral merchant to employ a belligerent vessel."

*The italics are the writer's.

[22]Johnson, J., in The Atalanta (1818) 16 U. S. 409, which affirmed the doctrine of The Nereide, *supra*, in speaking of the obstruction of the belligerent's right of search by the lading of neutral goods on board an armed belligerent carrier, said, at p. 425: "It cannot be expected that the belligerent will rest his complaint upon the humiliating ground of his inability to subdue his enemy; and if he should, the neutral may well reply it is his affair or his misfortune, but ought not in any of its consequences to affect the rights of the neutral."

[23]*Cf.* The Atalanta, *supra*, 426, 427.

[1]Black, Law of Judicial Precedent, 428; Van Ness *v.* Packard (1829) 27 U. S. 137, 144; Wheaton *v.* Peters (1834) 33 U. S. 591, 659.

[2]See Ray *v.* Sweeney (1878) 77 Ky. 1; Clawson *v.* Primrose (1873) 4 Del. Ch. 643, 652, 666.

[3]See Chilcott *v.* Hart (1896) 23 Colo. 40, 45 Pac. 391; Kreitz *v.* Behrensmeyer (1894) 149 Ill. 496, 36 N. E. 983; Reno Smelting etc. Works *v.* Stevenson (1889) 20 Nev. 269, 21 Pac. 317; Dawson *v.* Coffman (1867) 28 Ind. 20.

[4]1 Bl. Comm. *107; 1 Kent, Comm., *472; American Ins. Co. *v.* Canter (1828) 26 U. S. 511, 542. In Louisiana, however, civil matters have always been governed by the civil law, though the common law is applied in criminal procedure. State *v.* Depasse (1879) 31 La. Ann. 487.

to 1607 has been adopted;[5] in others, the Revolution marks the dividing line;[6] and still others have adopted it without reference to any date.[7] It is generally provided, furthermore, that only so much of the common law is adopted as is applicable to our circumstances and surroundings, and not inconsistent with the federal and state constitutions.[8] And, lacking such express qualifications, the courts have not hesitated to depart from common law rules that violate these conditions.[9]

An interesting dilemma was presented to the Supreme Court of Indiana by the recent case of *Ketelson* v. *Stilz* (Ind. 1916) 111 N. E. 423. In a suit to recover damages for fraud in an exchange of real estate, the appellees contended that they were released from liability by reason of a judgment obtained by the appellant against the appellees' joint tort-feasor, though execution on this judgment had been returned unsatisfied. This contention was supported on the ground that the common law of England prior to the fourth year of the reign of James I had been adopted by an Indiana statute, and that since 1606 the rule is well settled in England that a judgment against one joint tort-feasor bars an action for the same cause against another. The court, however, regarding this statute as adopting, not the common law rules as applied by the English courts prior to 1607, but rather "the general principles of the common law which underlie and control all rules of decisions throughout all time", preferred to follow the majority rule in the United States, which holds that nothing less than full satisfaction bars the plaintiff from proceeding against other

[5]See Hardage *v.* Stroope (1893) 58 Ark. 303, 24 S. W. 490; Ray *v.* Sweeney, *supra;* Chilcott *v.* Hart, *supra.*

[6]See Clawson *v.* Primrose, *supra*; Fla. Comp. Laws (1914) § 59.

[7]Sayles' Tex. Civ. Stat. (1914) Art. 5492; Neb. Rev. Stat. (1913) Art. 3697. The term "common law" may mean the rules enforced by the common law courts of England, and therefore may include the amendatory statutes prior to the colonization of America, 1 Kent, Comm., *473; Baker *v.* Crandall (1883) 78 Mo. 584; Commonwealth *v.* Leach (1804) 1 Mass. 58, or prior to the Revolution, Browning *v.* Browning (1886) 3 N. Mex. 371, 9 Pac. 677; see opinion of Dana, C. J., in Commonwealth *v.* Leach, *supra,* or it may refer solely to the unwritten law. See Levy *v.* McCartee (1832) 31 U. S. 102, 110; Chisholm *v.* Georgia (1793) 2 U. S. 419, 435; Matter of Lanphere (1886) 61 Mich. 105. Many states have expressly adopted the statutes of a general nature, applicable to our conditions, passed in aid of the common law before 1607, see Gerber *v.* Grabel (1854) 16 Ill. 217; Hardage *v.* Stroope, *supra,* or before 1776. Fla. Comp. Laws (1914) § 59.

[8]See State *v.* Akers (1914) 92 Kan. 169, 189, 140 Pac. 637, 645; Hageman *v.* Vanderdoes (1914) 15 Ariz. 312, 138 Pac. 1053.

[9]It has been held, for example, that the following English common law rules or doctrines are not applicable to our conditions: a rule of evidence which does not admit a tradesman's books unless supported by the oath of a clerk, Boyer *v.* Sweet (1841) 4 Ill. 120; the rule that a woman in an action for defamation imputing unchastity must prove special damage, Cooper *v.* Seaverns (1909) 81 Kan. 267, 105 Pac. 509; *contra,* Castleberry *v.* Kelly (1858) 26 Ga. 606; the doctrine of ancient lights, Meyers *v.* Gemmel (N. Y. 1851) 10 Barb. 537; *contra,* Clawson *v.* Primrose, *supra;* the test of navigability, State *v.* Akers, *supra;* the theory of riparian rights, Town of Brookhaven *v.* Smith (1907) 188 N. Y. 74, 80 N. E. 665; Martin *v.* Bigelow (Vt. 1827) 2 Aiken 184; Reno Smelting etc. Works *v.* Stevenson, *supra;* but see Slattery *v.* Harley (1899) 58 Neb. 575, 79 N. W. 151; and the rule that requires cattle to be fenced in. Wagner *v.* Bissell (1856) 3 Iowa 396.

joint tort-feasors. Certainly the latter rule is preferable,[10] but the authority of the English holding is beyond question in that country. And no distinction could be made on the ground that different conditions prevail in the United States. In view of the state statute, therefore, the court was obliged either to declare a harsh law, refuse to follow a well established precedent, or discover a middle way, as it did, by defining the term "English common law" and calling the English decision not binding.

It is sometimes said that decisions are not, strictly speaking, a part of the common law, but are merely evidence of what the common law is.[11] Such evidence may become more or less conclusive according to the recognition afforded to it; but there is not present, in theory at least, the binding force that characterizes a legislative enactment. With this definition of the common law, there is no difficulty in departing from the English decisions, except in so far as the doctrine of *stare decisis* is repudiated. It is true that we adopted the English common law as a system of jurisprudence,[12] but not English decisions;[13] and some of our courts have refused, therefore, to regard English decisions prior to the year when the common law was adopted as binding.[14] The majority of our courts, however, have treated such decisions as of controlling authority, and have contented themselves with declaring the law, in some cases commending its injustice to the legislature.[15] But whether these decisions are to be treated as evidence of the common law or as a part of it,[16] the courts in overriding such holdings clearly violate the doctrine of *stare decisis*, and it is this maxim, so important a rule in our system of law, that leads the courts in the second class of cases to follow the English precedents. But the rule of *stare decisis* may be qualified when the precedent is manifestly erroneous,[17] and its application is most strongly supported

[10]See Notes, p. 510.

[11]"The law consists not in the rules enforced by decisions of the courts at any one time, but [in] the principles from which these rules flow." Williams *v.* Miles (1903) 68 Neb. 463, 94 N. W. 705; Kreitz *v.* Behrensmeyer, *supra; cf.* Wilson *v.* Leary (1897) 120 N. C. 90, 26 S. E. 630.

[12]Thus in Grigsby *v.* Reib (1913) 105 Tex. 597, 153 S. W. 1124, it is held that a statute adopting the "common law of England" refers to the law as declared by the different states of the United States.

[13]Marks *v.* Morris (1809) 14 Va. 463.

[14]Sayward *v.* Carlson (1890) 1 Wash. 29, 40, 23 Pac. 830, 833; Baring *v.* Reeder (1806) 11 Va. *154, *161; Williams *v.* Miles, *supra;* see Cooper *v.* Seaverns, *supra.* English decisions subsequent to the date of adoption may be highly persuasive, but are never regarded as binding authorities. See Koontz *v.* Nabb (1860) 16 Md. 549; Cathcart *v.* Robinson (1831) 30 U. S. 264, 279. It has been remarked that the decisions of the English Privy Council, and not of the House of Lords, before 1776, should be regarded as conclusive of the common law in America. *In re* Easton's Will (1914) 80 Misc. 1, 145 N. Y. Supp. 373.

[15]Swayne *v.* Lone Acre Oil Co. (1905) 98 Tex. 597, 86 S. W. 740; Coburn *v.* Harvey (1864) 18 Wis. 156; Gerber *v.* Grabel, *supra* (and see separate opinion of Caton, J., as to time of adoption of common law); Clawson *v.* Primrose, *supra.*

[16]See Chamberlain, Stare Decisis, 17.

[17]See Black, Law of Judicial Precedent, 199; Chamberlain, Stare Decisis, 15.

when property or contract rights will be affected by its violation.[18] The decision in the principal case does not concern such rights, and, in view of the American authorities, it would appear that the court was justified in its holding.

EXPATRIATION.—The common law rule that allegiance was perpetual, and that no man had the right to expatriate himself without the consent of his native government,[1] was quite in accord with the almost universal view that there existed no inherent right of expatriation,[2] and was followed in many of the early American cases.[3] In view of the fact, however, that naturalization of aliens was encouraged in England and America, it was felt in both countries that it was illogical to refuse consent to expatriation; and hence each country has now given statutory consent thereto.[4] In most other countries this consent has likewise been accorded, by a declaration of the circumstances under which a native loses his nationality.[5] But it is an important restriction on this right, that an expatriate is not released from those obligations to his native country which have accrued before his emigration, and will be held bound to perform them, should he ever return.[6]

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[18]See Rockhill *v.* Nelson (1865) 24 Ind. 422; Kearny *v.* Buttles (1853) 1 Oh. St. 362; Treon *v.* Brown (1846) 14 Ohio 482.

[1]Proceedings against Macdonald (1747) 18 How. State Trials 858; see Calvin's Case (1608) 7 Rep. 1a, 13b, 25a; *cf. In re* Stepney Election Petition (1886) 17 Q. B. D. 54; 1 Hale, Pleas of the Crown, *68; 1 Bl. Comm. *369; Hall, International Law (6th ed.) 227.

[2]Hall, 232; Lawrence, International Law (4th ed.) § 96; Smith, International Law (4th ed.) 82.

[3]Williams' Case (C. C. 1799) 29 Fed. Cas. 1330; Ainslie *v.* Martin (1812) 9 Mass. 454; Shanks *v.* Dupont (1830) 28 U. S. 242; Hall, 230; see 13 Columbia Law Rev. 744; *contra,* Alsberry *v.* Hawkins (1839) 39 Ky. *177; 9 Op. Atty. Gen. 356 (1859); see Juando *v.* Taylor (D. C. 1818) 13 Fed. Cas. 1179; *cf.* Murray *v.* Schooner Charming Betsy (1804) 6 U. S. 64, 120.

[4]Act 33 & 34 Vict. c. 14, 6; Act 35 & 36 Vict. c. 39, 2; 15 Stat. 223. The American act characterizes expatriation as "a natural and inherent right." The Supreme Court has recently expressly refused to decide whether this is to be taken literally, or is merely the consent of our government to expatriation. Mackenzie *v.* Hare (1915) 239 U. S. 299, 309, 36 Sup. Ct. 106, 107. See 13 Columbia Law Rev. 744.

[5]8 Op. Atty. Gen. 139, 164 (1856); Hall, 232; Lawrence's Wheaton, International Law, 922; 1 Halleck, International Law (4th Eng. ed.) 436. While the Russian law is not entirely clear, it is possible that that country represents an exception. Hall, 234; Lawrence, § 96; 3 Moore, Digest of International Law, § 453.

[6]8 Op. Atty. Gen. 139, 146, 168 (1856); 9 Op. Atty. Gen. 356, 362 (1859); Davis, International Law (rev. ed.) 141, 143, 144. This question arises chiefly with reference to the duty of compulsory military training, in countries where that system obtains. If the obligation had accrued at the time of emigration, the expatriate may generally be compelled to serve, should he return to his native country. Lawrence, § 96; Lawrence's Wheaton, 922; Hall, 232. France apparently compels service, even if the emigration occurred before the obligation accrued. 3 Moore, 599. Under the present German law, a German who has resided abroad for ten years can be com-